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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 472

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

RICHARD VAN NEST GAMBRILL

No. 473

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MARJORIE K. CAMPBELL

No. 474

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

SEYMOUR H. KNOX

No. 475

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

DOROTHY K. G. ROGERS

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The Board of Tax Appeals wrote a separate opinion in each of these cases. The opinion in No. 472 (R. 13) is reported at 38 B. T. A. 981; the opinion in No. 473 (R. 112) is reported at 39 B. T. A. 916; and the memorandum opinions in the other two cases (No. 474, R. 47; No. 475, R. 92) are unreported.

The court below rendered one opinion in all four cases, which is reported at 112 F. (2d) 530.

JURISDICTION

The judgments of the court below were entered on June 28, 1940, in case No. 472 (R. 35), and on June 29, 1940, in the other three cases (No. 473, R. 139; No. 474, R. 69; No. 475, R. 113). A petition for writs of certiorari as to all four cases was filed on September 28, 1940, and granted on November 12, 1940. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. During years governed by the Revenue Acts of 1928 and 1932 respondents sold securities which

they had received from testamentary trusts. Three types of securities are involved:

(a) Securities owned by the decedent at the time of death. (Presented in Nos. 472, 473, and 475.)

(b) Securities purchased by the testamentary trustees. (Presented in all four cases.)

(c) Securities purchased by the executors. (Presented in Nos. 473 and 475.)

The questions presented relate to the proper basis, under Section 113 (a) of the Revenue Acts of 1928 and 1932, for determining gain or loss upon these sales, namely:

(1) Whether the basis of the first group of securities is their value when received by the trustees from the decedent's estate, as we contend, or their value at the date of delivery by the trustees to the beneficiary;

(2) Whether the basis of the second group of securities is their cost to the trustees, as we contend, or their value at the date of delivery by the trustees to the beneficiary; and

(3) Whether the basis of the third group of securities is their value when received by the trustees from the decedent's estate, as we contend, or their value at the date of delivery by the trustees to the beneficiary.[1]

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[1] Section 113 (b) of the Revenue Acts of 1928 and 1932 provides that the basis for determining gain or loss from the sale of property acquired before March 1, 1913, shall be the value specified in Section 113 (a), or the fair market

2. Whether, in the case of securities of the first two types enumerated in question 1, the holding period under Section 101 of the Revenue Act of 1928, relating to capital gains and losses, is to be measured from the date of the decedent's death for the first type and from the date of purchase for the second type, as we contend, or is to be measured for both types from the date of delivery by the trustees to the beneficiary. (Presented in Nos. 472 and 474.)

3. Whether in applying the "first in, first out" rule to a block of shares, part of which came to respondent from the decedent through the testamentary trust and part of which was purchased by respondent, respondent is to be deemed to have acquired the former part at the time of the decedent's death, as we contend, or at the time of delivery by the trustees to respondent (presented in No. 473).

STATUTES AND REGULATIONS INVOLVED

The Revenue Act of 1928 is applicable to some of the transactions involved in these cases, and the Revenue Act of 1932 is applicable to others.

The provisions of the 1928 Act and of the Treasury regulations promulgated thereunder which are pertinent to the question of basis for computing gain or loss are contained in the Appendix to the

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value of the property on March 1, 1913, whichever is greater. Since there is no dispute as to this proviso it is not taken into account in the Questions Presented and is ignored throughout this brief.

Government's brief in No. 346, *Maguire* v. *Helvering*. The provisions of the 1932 Act and of the Treasury regulations promulgated thereunder which are pertinent to that question are contained in the Appendix, *infra*, pp. 50–53, 55–57. These provisions do not differ in any respect here material from the provisions of the 1928 Act and the regulations thereunder. Section 113 (a) (5) of the two Acts is identical.

The provisions of the statutes and regulations pertinent to the questions of measuring the holding period and of determining the date of acquisition for purposes of the "first in, first out" rule are contained in the Appendix, *infra*, pp. 47–57.

STATEMENT

No. 472.—The facts have been stipulated (R. 24). As stated by the Board of Tax Appeals (R. 10), they may be summarized as follows:

On November 20, 1897, Mary Van Nest, grandmother of the respondent Richard Van Nest Gambrill died, leaving a will, the ninth article of which provided as follows (R. 10):

> NINTH: All the residue of my estate of every kind I give and devise as follows:
>
> One half thereof in equal shares to my daughters Mary Van Nest Jackson, Anna Van Nest Gambrill, and Jennie Van Nest Foster, and my granddaughter, Mary Alice Van Nest absolutely.

> The other half thereof in four equal shares to my executors, to hold the same in trust, one share for the benefit of each of the same four persons to wit my said three daughters and my said granddaughter and to receive the income and pay the same to her during her life with full power to invest and reinvest in their discretion without any limitation whatsoever and at her death to transfer and deliver the same as she if leaving issue shall by will direct or in the absence of such direction, to her issue equally, or if she shall leave no issue, then to the survivors of said four persons to wit my said three daughters and my said granddaughter, and to the issue of any of the said four persons who may have died, the issue to take the share which the parent would have taken if living. * * *

On January 4, 1898, the executors delivered to themselves, as trustees for Anna Van Nest Gambrill, respondent's mother, certain securities (R. 10–11).

On March 23, 1928, Anna Van Nest Gambrill died without having exercised the power of appointment (R. 11). Respondent, born prior to the death of his grandmother, Mary Van Nest, was the sole surviving issue of his mother (R. 11).

On May 5, 1928, the trustees, after settling their accounts, delivered the balance of the corpus of the trust, consisting of securities, to respondent

as the remainderman (R. 12). Some of the securities were part of the original trust *res*, and others had been purchased by the trustees with trust funds, both prior to and subsequent to March 1, 1913 (R. 10–13).

During the calendar year 1930 respondent sold some of those securities, including both securities which were part of the original trust *res* and securities which had been purchased by the trustees (R. 12).

The Board of Tax Appeals sustained respondent's contentions that his basis for both classes of securities was their fair market value when delivered to him by the testamentary trustees and that his holding period for capital gain or loss purposes should be measured from the date when that delivery was made. It rejected the Commissioner's contentions that the correct basis was, for securities owned by the decedent at death, value at date of distribution by executors to themselves as trustees, and for securities purchased by the trustees, cost to the latter; and his contention that respondent's holding period should be measured from the decedent's death, for securities owned by him at that time, and from the dates of trustees' purchases, for securities purchased by them (R. 13–17).

The Circuit Court of Appeals affirmed the Board (R. 35).

Nos. 473, 474, and 475.—The facts, as stipulated (No. 473, R. 71; No. 474, R. 20; No. 475, R. 46), may be summarized as follows:[2]

Seymour H. Knox, the father of these three taxpayers, died May 16, 1915 (No. 473, R. 72). His will (No. 473, R. 87) provided that the residuary estate should be divided into four parts. One part, consisting of 20 percent of the whole, the testator did "give, devise, and bequeath" to three trustees in trust for the following uses and purposes (No. 473, R. 97):

> To receive, hold and, from time to time, invest and reinvest the same, and to collect the rents, income, issues, and profits on the property from time to time constituting such trust fund and to pay over so much of the net income arising therefrom, as to my said trustees shall seem wise and proper toward the support, maintenance, and education of my daughter, Marjorie Knox, until she shall arrive at the age of twenty-one (21) years, and to accumulate the balance of the income during her minority for her benefit, and to pay over the accumulated income to her when she shall arrive at the age of twenty-one (21) years and hereafter to pay over the entire net income to my said daughter, Marjorie Knox, until she shall arrive at the age of twenty-eight (28) years,

[2] In the following statement, where the facts are common to all three cases reference is made only to the Record in No. 473.

at which time, I give, devise, and bequeath to my said daughter, Marjorie Knox, one-half (½) of the property then constituting said trust fund and I direct my said trustees to pay over the net income on the remaining one-half (½) of said trust fund until she shall arrive at the age of thirty-five (35) years, at which time I give, devise, and bequeath the remaining part of said trust fund to my said daughter, Marjorie Knox, and to her heirs and assigns forever.

In the event that my said daughter, Marjorie Knox, shall die before reaching the age of thirty-five (35) years, I give, devise, and bequeath any part or portion of said trust fund, which has not then been paid over to her, or to the possession of which at the time of her death she was not entitled, unto the issue of said Marjorie Knox, if any, surviving her, to be divided among them, share and share alike. And in case there be no issue her surviving, then I give, devise, and bequeath said trust fund unto her heirs.

The Marjorie Knox referred to is the respondent Marjorie K. Campbell (No. 473, R. 72).

Another 20 percent was placed in trust for respondent Dorothy K. G. Rogers under exactly the same terms (No. 473, R. 95; No. 475, R. 75, 46).

A third 20 percent and certain specific securities in addition were placed in trust for respondent Seymour H. Knox under the same terms except that he was to receive $500,000 of the trust fund when he reached the age of twenty-five, one-half of

the remaining trust fund when he became thirty, and the balance at thirty-five. The income was payable to him in the meantime (No. 473, R. 96; No. 474, R. 32).

The trusts were formally established on July 1, 1921, and the executors on that date, pursuant to order of the Surrogate's Court, transferred to the trustees the property as provided in the will (No. 473, R. 72, 75, 103; No. 474, R. 39; No. 475, R. 47, 50, 55, 60, 63, 83).

Marjorie K. Campbell attained the age of twenty-eight on July 10, 1928, and received on that date one-half of the property then constituting her trust fund. Certain of the securities which she received at that time she sold during 1933, and certain of the bonds matured and were paid during 1933. Some of the securities sold by her had been held by her father at the time of his death, others had been purchased by the executors, and still others had been purchased by the trustees (No. 473, R. 114).

In 1926 and 1927 Marjorie Campbell purchased stock of F. W. Woolworth Company which, with stock dividends received in 1927, amounted to 1,000 shares. In 1928 she received delivery from the testamentary trust of 15,000 shares of F. W. Woolworth stock which represented shares owned by the testator at his death increased by subsequent stock dividends and a tax-free stock split up. In 1929 the Woolworth Company again split

its stock, giving two and one-half shares for one. Marjorie Campbell surrendered the 16,000 shares she owned (1,000 purchased, and 15,000 received from the trust) and received 40,000 shares. This was a tax-free transaction. In 1933 Marjorie Campbell sold 10,000 of the shares received in the 1929 split up. There is no way of identifying the shares sold with any particular shares surrendered in the 1929 split up (No. 473, R. 83–86).

Seymour H. Knox attained the age of thirty on September 1, 1928, and received on that date one-half of the trust fund then remaining in the hands of the trustees, including 8,575 shares of stock of Marine Share Corporation, of which 5,160 were purchased by the trustees on August 31, 1927, and 3,415 were purchased by the trustees on August 30, 1928. Mr. Knox gave up those shares thereafter in a non-taxable exchange and on June 10, 1930, sold the shares received on that exchange (No. 474, R. 49).

Dorothy K. G. Rogers became twenty-eight on August 26, 1924, and thirty-five on August 26, 1931, on each of which days she received distributions in accordance with the terms of the trust. During 1933 she sold securities so received. Some of the securities sold had been purchased by the trustees, some by the executors, and some of them had been owned by her father at the date of his death (No. 475, R. 93).

The Board of Tax Appeals sustained respondent's contentions that their basis was the fair

market value of the securities when delivered to them by the testamentary trustees; that the holding period for capital gain or loss purposes should be measured from the date of that delivery; and that acquisition for the purposes of the "first in, first out" rule took place on the same date. It rejected the Commissioner's determination that the correct basis was, as to securities owned by the decedent at death and as to securities purchased by the executors, the value of such securities when distributed by the executors to the trustees; and as to securities purchased by the trustees, their cost to the trustees. It also rejected the Commissioner's contentions that the holding period for capital gain or loss purposes should be measured from, and that acquisition for purposes of the "first in, first out" rule took place on, the date of the decedent's death for securities then owned by him, and the dates of purchase for securities purchased by executors or trustees (No. 473, R. 112–116; No. 474, R. 47–50; No. 475, R. 92–93).

The Circuit Court of Appeals affirmed the Board (R. 473, R. 133–139).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the words "time of the distribution to the taxpayer," as used in Section 113 (a) (5) of the Revenue Acts of 1928 and 1932,

mean the time of delivery by testamentary trustees to a beneficiary, and not the time of transfer from the executors to the trustees. (This assignment applies to Nos. 472, 473, and 475.)

2. In holding that the basis for determining gain or loss on the sales here involved was value at the dates of transfer from the trustees to the respective respondents. (This assignment applies to each of the instant cases.)

3. In holding that the dates of transfer from the trustees to the respondents should govern in determining the holding period for purposes of computing capital gain or loss under Section 101 of the Revenue Act of 1928. (This assignment applies to Nos. 472 and 474.)

4. In holding that the time of transfer from the trustees to the respondent should govern in determining when securities were acquired for purposes of applying the "first in, first out" rule. (This assignment applies to No. 473.)

5. In not holding, as to securities owned by the decedent at the time of his death and transferred from the executors to the respondents through the trustees, that the basis for determining gain or loss is value at the time of delivery by the executors to the trustees. (This assignment applies to Nos. 472, 473, and 475.)

6. In not holding, as to securities purchased by the trustees and transferred to the respondents, that the basis for determining gain or loss is cost

to the trustees. (This assignment applies to each of the instant cases.)

7. In not holding, as to securities purchased by the executors and transferred to respondents through the trustees, that the basis for determining gain or loss is value at the time of transfer from the executors to the trustees. (This assignment applies to Nos. 473 and 475.)

8. In not holding that for purposes of determining capital gains, the securities were held from and acquired at the date of the decedent's death, if owned by the decedent at death, and from dates of purchase, if purchased by trustees. (This assignment applies to Nos. 472 and 474.)

9. In not holding that for purposes of applying the "first in, first out" rule, the securities acquired by respondent from the decedent through the testamentary trust were acquired at the date of the decedent's death. (This assignment applies to No. 473.)

10. In affirming the decisions of the Board of Tax Appeals.

SUMMARY OF ARGUMENT

I. The respondents' basis for securities delivered to them by the testamentary trustees is their value when distributed by the executors to the trustees, in the case of securities owned by the decedent at his death or purchased by the executors, and cost to the trustees in the case of securities purchased by them. The Government's argu-

ment to this effect is contained in its brief in *Maguire* v. *Helvering*, No. 346, this Term, which is incorporated herein by reference.

II. The holding period for determining whether securities are capital assets within Section 101 of the Revenue Act of 1928 should be computed from the decedent's death for securities then owned by the decedent, and from the trustees' purchases for securities purchased by them. We have argued in our brief in the *Maguire* case that the value at the "time of * * * acquisition" which is the basis under the revenue acts other than those of 1928 and 1932 for property "acquired by bequest, devise, or inheritance", signifies the date of the decedent's death in the case of property which was owned by the decedent and the date of purchase by the trustees in the case of property purchased by them. And in *McFeely* v. *Commissioner*, 296 U. S. 102, this Court held that the date of "acquisition" for basis purposes under those acts and the date of commencement of the two-year holding period which defines a capital asset, are identical, regardless of the meaning of the phrase "time of distribution to the taxpayer" in Section 113 (a) (5) of the Revenue Acts of 1928 and 1932. If, however, we are right that the phrase just quoted refers to the time of distribution by the decedent's estate to the testamentary trust, and, further, that the beneficiary's basis for property purchased by the testamentary trustees is the cost to the trustees, then

the beneficiary is given the same basis as the trustee would have had if the trustee had made the sale. In that event there is supplied an additional reason that the beneficiary's holding period for capital gain or loss purposes begins to run at the date of death for property owned by the decedent at that time, and at the date of purchase for property purchased by the trustees; for Section 101 (c) (8) (B) of the Revenue Act of 1928 provides that a predecessor's holding period shall be added to the taxpayer's if the property has in the taxpayer's hands the same basis it would have had in the hands of the predecessor.

III. For the purposes of the "first in, first out" rule, stock received by a beneficiary from the decedent through a testamentary trust is "first in," as compared with stock purchased by the beneficiary after the death of the decedent but before the beneficiary received the inherited stock from the trustees. The so-called first in, first out rule is established by Treasury regulation for the purpose of artificially identifying shares sold with lots of the same stock which were purchased at different times, where actual identification is impossible. The regulations apply in terms only to purchased stock, but it is conceded by both sides that the rule should be applied here, despite the fact that part of the shares were acquired by will. The Commissioner has determined that for such shares the date of acquisition should be treated as equivalent

to the date of purchase, and that the date of the decedent's death is the date of acquisition. This solution is a reasonable disposition of an administrative difficulty, and it should be upheld. As an additional reason for upholding the Commissioner's determination, it may be observed that if our contentions as to basis under the 1928 and 1932 Acts are correct, then, in effect, the trustees' holding period must be added to that of the beneficiary under Section 101 (c) (8) (B) of the statute. In this event the applicable regulation expressly requires that the acquisition of shares for the purposes of the "first in, first out" rule be computed from the beginning of the trustees' holding period.

IV. It is not material to the issues here involved whether respondents' interests vested at the decedent's death, or, as they contend, only when each of them became entitled to the transfer of title from the testamentary trustees. If it is material, however, under the New York law respondents' interests vested at the decedent's death.

A number of Circuit Courts of Appeals have held, under the revenue acts prescribing value at the time of acquisition as the basis, that a vested remainderman acquires at the decedent's death property passing to him from the decedent through a testamentary trust. The Circuit Courts of Appeals are divided, however, as to whether a contingent remainderman acquires property delivered to him by a testamentary trustee at the de-

cedent's death or not until his remainder vests. The respondents in Nos. 473–475 contend that their respective interests vested only when each became entitled to the transfer of corpus from the testamentary trustees. Their argument continues that they cannot be deemed to have received distribution in advance of acquisition, and that acquisition for the purposes of the "first-in-first-out" rule and of marking the beginning of the capital asset holding period likewise cannot be deemed to antedate vesting.

We submit that no logical argument can be advanced for distinguishing between a vested and a contingent remainderman in determining the basis of each for property received from a testamentary trust. *Helvering* v. *Hallock,* 309 U. S. 106. The tax reasons are as strong in the one case as in the other for relating acquisition back beyond actual receipt of possession; in each case the taxpayer did not have control over the property while it was in the trustees' hands. Even a vested remainderman normally cannot know until the trust terminates that any specific property will be his, since the trustees may sell it. The Treasury regulations since 1934 specifically state that a remainderman, whether vested or contingent, acquires at the decedent's death property then owned by the decedent.

If, however, the issue is deemed material, under New York law the estates of the respondents in Nos. 473–475 were vested at the testator's death.

The New York decisions state that an interest is vested when a person in being can be pointed to who would take at the termination of any preceding estate, and that a condition which might take away the right of such person before the accrual of his right to possession is a divesting condition. This formula applied to the interests of the respondents in Nos. 473–475 marks them as vested.

ARGUMENT

I

RESPONDENTS' BASIS FOR SECURITIES DELIVERED TO THEM BY TESTAMENTARY TRUSTEES IS THE VALUE OF THE SECURITIES WHEN DISTRIBUTED BY EXECUTORS TO TRUSTEES, IF THE SECURITIES WERE OWNED BY THE DECEDENT AT HIS DEATH OR WERE PURCHASED BY THE EXECUTORS, AND COST TO THE TRUSTEES IF THE SECURITIES WERE PURCHASED BY THEM

In the brief for the Commissioner in *Maguire* v. *Helvering,* No. 346 this Term, it is argued that under Section 113 (a) (5) of the Revenue Acts of 1928 and 1932 the basis for securities delivered to a beneficiary by testamentary trustees is their value when distributed by the executors to the trustees, if the securities were owned by the decedent at his death, and cost to the trustees if the securities were purchased by them. That argument is respectfully incorporated herein by reference, and is not repeated here.

While the *Maguire* case does not involve the additional question presented here (in Nos. 473

and 475) of the basis for securities purchased by the executors, we think our argument in the *Maguire* case dispositive of that issue also. In Point II of that argument we concede, in view of language in the committee reports on the 1928 Act, that subsection (5) of Section 113 (a) of the Revenue Acts of 1928 and 1932 applies to purchases by executors. Accordingly the basis for such property is its value "at the time of the distribution to the taxpayer," and the controversy is whether, as we contend, the quoted phrase signifies the delivery of the property by the executors to the trustees, or, as respondents contend, the further delivery of the property by the trustees to them. This issue is, we think, precisely the same as that with respect to property received by executors from the decedent, which is covered in Point I of our brief in the *Maguire* case. If we are right in contending that the time of distribution for property which was owned by the decedent is the date on which it is turned over by the executors to the trustees, we think the same result follows as to property purchased by executors. On the other hand, if we are mistaken as to property owned by the decedent, and if the time of distribution for such property is the date on which it is delivered by the trustees to the beneficiaries, we concede that the same result follows as to property purchased by executors.

II

THE HOLDING PERIOD FOR DETERMINING WHETHER SECURITIES ARE CAPITAL ASSETS WITHIN SECTION 101 OF THE REVENUE ACT OF 1928 SHOULD BE COMPUTED FROM THE DECEDENT'S DEATH FOR SECURITIES THEN OWNED BY THE DECEDENT, AND FROM THE TRUSTEES' PURCHASES FOR SECURITIES PURCHASED BY THEM

In Nos. 472 and 474 some securities were sold within two years of their delivery by the trustees to respondents, but more than two years after they had come into the hands of the trustees, either through purchase or by distribution from the executors of the decedent's estate.[8] Section 101 of the applicable Revenue Act of 1928 (Appendix, p. 47) provides for lower rates of tax upon capital net gains and for smaller deductions for capital net losses, under certain circumstances, than would prevail for ordinary gains or losses. Capital gains or losses are defined as those resulting from sales or exchanges of capital assets. (Sec. 101 (c) (1) and (2).) Capital assets are defined as "property held by the taxpayer for more than two years" with certain exceptions and qualifications. (Sec. 101 (c) (8).) Thus, the securities referred to are capital assets (and the gain or loss realized upon their sale is capital net gain or loss)

[8] The securities delivered to the trustees by the executors had all been owned by the decedent; the question here dealt with is not presented as to securities purchased by executors.

only if respondents are deemed to have held them for a period prior to their actual delivery to respondents, and while they were in the possession of the trustees.

It so happens that if the Commissioner is right in his contention that respondents' basis for these securities is their value when delivered by executors to trustees, or in the case of securities purchased by the latter, their cost to the trustees (subject to the qualification stated note 1, *supra*, p. 3, about the March 1, 1913, value of securities acquired before that date), it would be to the Commissioner's advantage to assert that these securities were not capital assets in respondents' hands, since their selling price exceeded their basis thus computed. Nevertheless we think that *McFeely v. Commissioner,* 296 U. S. 102, and consistency with our argument in the *Maguire* case, require the conclusion that respondents' holding period dates from the decedent's death for property which he owned and from the date of purchase for property purchased by the trustees. In the *McFeely* case the Court held that the beneficiary's holding period under Section 101 of the Revenue Act of 1928 dated from the decedent's death for property which had been owned by the decedent and which was distributed to the beneficiary by the executors, notwithstanding that the beneficiary's basis under Section 113 (a) (5) of the 1928 Act was value at the

time of distribution to him by the executors. And the Court further held that the commencement of the holding period was the same as the "time of * * * acquisition" which the revenue acts prior to 1928 [and since 1934] prescribed as the basis for property "acquired by bequest, devise, or inheritance." In *Brewster* v. *Gage,* 280 U. S. 327, the Court had decided that the "time of * * * acquisition" for basis purposes was the date of the decedent's death in the case of property which he had owned and which was distributed to the beneficiary by the executors. And in our brief in the *Maguire* case we argue (though the question is not directly involved), that value at the "time of * * * acquisition" under the revenue acts other than those of 1928 and 1932 signifies the date of the decedent's death in the case of property which was owned by the decedent, and the date of purchase by the trustees in the case of property purchased by them. Hence, as stated, we take the position here that respondents' holding period dates from the decedent's death for property which the decedent owned and from the date of purchase for property purchased by the trustees. Under the *McFeely* case this result follows even if respondents are right and we are wrong about the basis question under the 1928 and 1932 Acts—that is, even if the basis for both classes of property is value when delivered to the beneficiary by the testamentary trustees.

Respondents have urged, apparently thinking it necessary to their position on the basis question, and the Board and the court below have adopted the view, that the instant cases are distinguishable from the *McFeely* case because here a testamentary trust intervened between death and delivery to the taxpayer. But in other cases involving basis under the revenue acts other than those of 1928 and 1932 the Circuit Courts of Appeals (including the court below) have applied the rule of *Brewster* v. *Gage* though testamentary trusts intervened,[4] and have held that the decedent's death was the "time of * * * acquisition." And under the *McFeely* case that question is precisely the same as that there involved, *i. e.,* as to when the holding period under Section 101 commenced.

A qualification made by some cases[5] but recently repudiated by the court below in *Van Vranken* v. *Commissioner,* decided December 2,

[4] *Chandler* v. *Field,* 63 F. (2d) 13 (C. C. A. 1st), certiorari denied, 289 U. S. 758; *Warner* v. *Commissioner,* 72 F. (2d) 225 (C. C. A. 2d), certiorari denied, 293 U. S. 620; *Van Vranken* v. *Commissioner, supra; Roebling* v. *Commissioner,* 78 F. (2d) 444 (C. C. A. 3rd); *Beers* v. *Commissioner,* 78 F. (2d) 447 (C. C. A. 3rd), certiorari denied, 296 U. S. 620; *Molter* v. *Commissioner,* 69 F. (2d) 7 (C. C. A. 7th); *Hopkins* v. *Commissioner,* 69 F. (2d) 11 (C. C. A. 7th); *Huggett* v. *Burnet,* 64 F. (2d) 705 (App. D. C.).

[5] *Pringle* v. *Commissioner,* 64 F. (2d) 863 (C. C. A. 9th), certiorari denied, 290 U. S. 656; *Reynolds* v. *Commissioner,* 114 F. (2d) 804 (C. C. A. 4th), now pending before this Court on petition for certiorari, No. 684, present Term.

1940, reported in 1940 C. C. H., vol. 4, par. 9807, is that in the case of a beneficiary who has only a contingent (instead of a vested) interest prior to the termination of the trust, the "time of * * * acquisition" is the termination of the trust, because such a beneficiary does not "acquire" the property until the remainder vests at the time of that termination. We argue, *infra*, pp. 30-45, that the respondents in these cases took vested remainders at the deaths of the respective decedents, but that even if they did not, the distinction for basis purposes made by some courts between vested and contingent remaindermen is untenable and should not prevail. Under the *McFeely* case that argument applies equally on the holding period question, and we therefore think that whether or not respondents' interests were vested, their holding periods began at the dates of death or of purchase by the trustees.

The foregoing is without reference to our contentions in the *Maguire* brief as to basis under the 1928 (and 1932) Acts. If, however, we are correct on that issue, additional support is afforded to the proposition that the holding period under Section 101 of the Revenue Act of 1928 should be computed from the decedent's death for securities then owned by the decedent and from the trustees' purchases for securities purchased by them. Section 101 (c) (8) (B) of the Revenue Act of 1928 provides that in determining the taxpayer's holding period there shall be included the period for

which the property was held by any other person, if under Section 113 the property has the same basis in the taxpayer's hands as it would have in the hands of the other person. If we are correct in our contentions that the beneficiary's basis for securities owned by the decedent at his death is their value when distributed by the executors to the trustees, and that the basis for securities purchased by the trustees is their value when purchased, then the property has the same basis in the hands of the beneficiary that it would have had in the hands of the trustees, and Section 101 (c) (8) (B) is called into operation.

III

FOR THE "FIRST IN, FIRST OUT" RULE, STOCK RECEIVED BY RESPONDENT FROM THE DECEDENT THROUGH A TESTAMENTARY TRUST IS "FIRST IN", AS COMPARED WITH STOCK PURCHASED BY RESPONDENT AFTER THE DEATH OF THE DECEDENT BUT BEFORE SHE RECEIVED THE INHERITED STOCK

Respondent in No. 473, Marjorie K. Campbell, was the owner in 1933 of 40,000 shares of F. W. Woolworth Company stock, of which she sold 10,000 shares in that year. She had obtained the 40,000 shares in 1929 in an exchange, pursuant to a recapitalization of the Woolworth Company, of two and one-half shares of new stock for each share of old stock (R. 85). Respondent's old stock which went into the exchange consisted of 1,000 shares, representing purchases with her own funds subsequent

to her father's death but prior to 1928, and 15,000 shares which had been owned by her father at his death and which were delivered to her by testamentary trustees in 1928 (R. 83–84). The 10,000 shares sold by respondent in 1933 cannot be identified as being derived either from her own purchases or from the shares received from the trustees, since the identity of the shares was lost in the exchange (R. 85).

The court below agreed that the so-called "first in, first out" rule should be applied to determine the cost of the stock sold, but held that the Commissioner erred in allocating the stock sold entirely to the old shares acquired from respondent's father; the court ruled that he should have allocated the shares sold first to the shares purchased by respondent. In other words, the court (and the Board of Tax Appeals) held that the purchased shares should be regarded as "first in."

The so-called "first in, first out" rule, established by Treasury regulation, has for its purpose the artificial identification of shares sold out of lots of the same issue of stock purchased at different times and for different prices, where the actual identification of shares sold with particular shares purchased is impossible. Cf. *Helvering* v. *Rankin*, 295 U. S. 123; *Snyder* v. *Commissioner*, 295 U. S. 134. The pertinent regulations are Articles 58 and 600 (4) of Treasury Regulations 77 (Appendix, pp. 55, 56), promulgated under the Revenue Act of 1932. The general rule is stated in

Article 58 that where the stock sold cannot be identified with any particular lots purchased, it shall be charged against the earliest purchases. Article 600 (4) applies the same rule to stock obtained in a reorganization in respect of several lots purchased at different times or prices.

These regulations refer specifically to purchases only and so do not in terms apply to the shares acquired under the will of the taxpayer's father, but since the problem here is in substance the same as that with which the regulations deal the parties agreed before the Board of Tax Appeals that the "first in, first out" rule should be applied (No. 473, R. 115).

We have contended in the *Maguire* brief that for basis purposes under the revenue acts other than of 1928 and 1932 a beneficiary of a testamentary trust acquires the property at the decedent's death. And we have contended under Point II herein, that the capital asset holding period commences at the date of the beneficiary's "acquisition," which is the same as the time of acquisition for basis purposes, i. e., the date of the decedent's death. From his determination in this case it appears that the Commissioner's rule is to use this same date of acquisition for "first in, first out" purposes. We submit that such a rule is entirely permissible. The rule is necessarily artificial, but some method of determination must be adopted for administrative purposes. Unless it

reaches a result which is of necessity wrong, and in such sense arbitrary, the administrative rule should not be overturned. There can be no real substance to an argument that the rule must necessarily depend on physical possession or the acquisition of title.

The foregoing argument is made without reference to our contention as to basis under the Revenue Acts of 1928 and 1932. But if we are right in that argument, there is still another theory upon which it may be held that the father's shares are to be considered first in. Article 58 of Treasury Regulations 77 states:

> In the determination of the earliest purchases of stock the rules prescribed in subparagraphs (A), (B), (C), and (D) of section 101 (c) (8) (relating to the period for which property has been held) shall be applied. * * *

As we have stated in Point II, *supra*, p. 25–26, under the literal language of Section 101 (c) (8) (B) of the Revenue Acts of 1928 and 1932, a testamentary trustee's holding period is to be included in that of the beneficiary, if our theory as to basis is sound, since upon our theory the basis for each is the same. If such is the case it would follow, therefore, that under Article 58 the beneficiary's stock is purchased or acquired at the date of the decedent's death, since the trustee's holding period begins at that time.

IV

IT IS NOT MATERIAL TO THE ISSUES HERE INVOLVED WHETHER OR NOT RESPONDENTS' INTERESTS VESTED AT THE DECEDENT'S DEATH; IF MATERIAL, THEY DID SO VEST

In interpreting the provision, found in all of the Revenue Acts since 1921 except the Acts of 1928 and 1932, that the basis for property acquired by gift, devise, or inheritance is its fair market value at the time of its acquisition, a number of Circuit Courts of Appeals have held that a vested remainderman acquires at the decedent's death property passing to him from the decedent through a testamentary trust. *Chandler* v. *Field,* 63 F. (2d) 13 (C. C. A. 1st), certiorari denied, 289 U. S. 758; *Warner* v. *Commissioner,* 72 F. (2d) 225 (C. C. A. 2d), certiorari denied, 293 U. S. 620; *Roebling* v. *Commissioner,* 78 F. (2d) 444 (C. C. A. 3rd); *Beers* v. *Commissioner,* 78 F. (2d) 447 (C. C. A. 3rd), certiorari denied, 296 U. S. 620; *Molter* v. *Commissioner,* 69 F. (2d) 7 (C. C. A. 7th); *Hopkins* v. *Commissioner,* 69 F. (2d) 11 (C. C. A. 7th); *Huggett* v. *Burnet,* 64 F. (2d) 705 (App. D. C.). These decisions are a logical extension of *Brewster* v. *Gage,* 280 U. S. 327, which related back to the date of the decedent's death the acquisition by a residuary legatee of property originally owned by the decedent and distributed to the legatee by the executors.

It has been held by some lower courts, however, that a contingent remainderman does not

acquire property delivered to him by a testamentary trustee until his remainder vests. *Pringle v. Commissioner,* 64 F. (2d) 863 (C. C. A. 9th), certiorari denied, 290 U. S. 656; *Reynolds* v. *Commissioner,* 114 F. (2d) 804 (C. C. A. 4th), now pending in this Court on petition for writ of certiorari, No. 684, present Term. An analogous rule has been held to apply to a contingent remainderman who acquires property by transfer in trust *inter vivos. Forbes* v. *Commissioner,* 82 F. (2d) 204 (C. C. A. 1st). On the other hand, the Circuit Court of Appeals for the Second Circuit, relying upon this Court's decision in *Helvering* v. *Hallock,* 309 U. S. 106, recently held that for purposes of Section 113 (a) (5) of the 1934 Act no distinction should be recognized between vested and contingent remainders, and that a remainderman acquired property at the decedent's death within the meaning of that section whether or not he had a vested remainder at that time. *Van Vranken* v. *Commissioner,* decided December 2, 1940, reported in 1940 C. C. H., vol. 4, par. 9807. See also *Archbold* v. *Helvering,* decided December 2, 1940, reported in 1940 C. C. H., vol. 4, par. 9808.

The respondent in No. 472 has not disputed our assertion that his estate vested at the testator's death, but the respondents in Nos. 473–475, inclusive, relying upon the distinction made by the above cases, have argued that their respective estates did not vest until each of them became

entitled to the transfer of corpus from the testamentary trustees. While we are concerned in these cases with the 1928 and 1932 Acts, which speak of the "time of the distribution to the taxpayer", rather than of the time of acquisition, respondents point out that it would be illogical to think of distribution to a taxpayer as preceding his acquisition. And they argue that "acquisition", and hence time of distribution, should not refer to the time of distribution to a trustee for a contingent remainderman, even though that remainderman does finally come into possession of and sell the property in question. Respondents in Nos. 473–475 have also contended that for the purposes of the "first in, first out" rule and of marking the beginning of the holding period which determines whether property is a capital asset, each of them acquired the property when, and not before, their respective estates vested, which, they say, was when they became entitled to the transfer of corpus from the testamentary trustees.

1. We submit, in the first place, that no distinction should be drawn between a contingent remainder and a vested remainder subject to divestment upon an identical contingency, in determining the basis of property received from a testamentary trust. Each remainderman has become the taxpayer only because the property in question has been delivered to and sold by him. In each case

the tax reasons are equally strong for relating back the acquisition date to the date of the decedent's death and the distribution date to the date of the distribution of the decedent's estate; for in each case it is equally undesirable to deny tax effect to changes in value occurring while the property is held by testamentary trustees prior to its tax-free transfer to the taxpayer. Nor has a contingent remainderman any greater cause for complaint than a vested remainderman. Neither has possession or control of the property in question while it is held by the fiduciary. Even a vested remainderman normally cannot be sure that he will get any particular property in the trust estate, since the trustee usually has the power to invest and reinvest, or to convert into cash before distributing, as the trustees had in the instant cases. The distinction on which respondents rely is not between conditional and absolute estates, but between technically vested and technically contingent estates.

Indeed, if we correctly understand respondents' contention, they concede that under New York law, which they assert is controlling, each of them would have taken a vested estate at the testator's death if he had employed slightly different wording in the limitations. They admit that if there had been a gift to each child subject to a trust until he reached a given age, his estate would have been vested; but they assert that since the gift was to trustees to pay the income to the child until

he reached that age and then to pay the principal to him, it was contingent. We do not understand respondents to contend that the gift over in the event of the child's death under the given age affects the controversy. Thus no substantive rights of any beneficiary are involved. The decisions of this Court have clearly established the rule that the application of a Federal tax statute should not depend upon such variations and complexities of local law, especially where the distinctions which would result involve form or definition rather than substance. *Lyeth* v. *Hoey,* 305 U. S. 188, 193–194; *Morgan* v. *Commissioner,* 309 U. S. 78, 80–81; *Burnet* v. *Harmel,* 287 U. S. 103.

The Treasury regulations applicable to the 1926 and earlier Acts have consistently stated that in the case of property acquired by bequest, devise, or inheritance, the value of the property as appraised for estate or inheritance tax purposes shall be taken to be the value thereof at the time of acquisition.[6] *Brewster* v. *Gage,* 280 U. S. 327, gave these regulations the obvious interpretation that property acquired by bequest, devise, or inheritance is acquired at the decedent's death. We submit that O. D. 727, 3 Cum. Bull. 53 (1920), ruling that a contingent remainderman receiving property from

[6] Treasury Regulations 33 (1918 Revision), Par. 44 (1916 Act); Treasury Regulations 45, Art. 1562 (1918 Act); Treasury Regulations 62, Art. 1563 (1921 Act); Treasury Regulations 65 (1924 Act) and 69 (1926 Act), Art. 1594.

the decedent through a testamentary trust does not acquire until the vesting of his estate, is out of harmony with the regulations.[7] Beginning in 1934 the regulations have expressly provided that property acquired by bequest, devise, or inheritance is acquired at the decedent's death, whether the taxpayer's interest was then vested or contingent.[8] The 1934 regulations were upheld by the Second Circuit in the *Van Vranken* case, *supra*, and we submit that they do not change the import of the regulations in 1926 and theretofore.

2. The will of Seymour H. Knox, the testator in Nos. 473–475, devised property in trust for each of his children, the income to be paid to the child until he reached a given age, "at which time, I give, devise, and bequeath" the principal to him; but if he should die before reaching the specified

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[7] This view is strengthened by the remarks of the Senate and House Committees with respect to Section 113 (a) (5) of the Revenue Act of 1934, which reverted to the form of Section 204 (a) (5) of the Revenue Act of 1926. The Committees stated that the Supreme Court in *Brewster* v. *Gage* had defined "the date of acquisition" to mean "the date of death in the case of all property passing by bequest, devise, and inheritance, whether real or personal. * * *" Report of Senate Finance Committee, S. Rep. No. 558, 73d Cong., 2d Sess., pp. 34–35 (1939–1 Cum. Bull. (Part 2) 586, 612–613); Report of House Ways and Means Committee, H. Rep. No. 704, 73d Cong., 2d Sess., p. 28 (1939–1 Cum. Bull. (Part 2) 554, 575).

[8] Treasury Regulations 86, 94, and 101, Art. 113 (a) (5)–1 (promulgated under the Revenue Acts of 1934, 1936, and 1938, respectively); Treasury Regulations 103, Sec. 19.113 (a) (5)–1 (promulgated under the Internal Revenue Code).

age, the principal was to go to his surviving issue, and, if none, to his heirs at law. Although we believe it to be immaterial, under the New York law this probably gives to each of the respondents in Nos. 473–475 a technically vested estate at the testator's death.

The inquiry into the New York law is beclouded at the outset, however, and the undesirability of having federal tax issues turn on the distinction between vested and contingent remainders is illustrated by the fact that, so far as we can learn, the distinction is without practical effect in New York. While the New York Real Property Law defines vested and contingent remainders,[9] and while the New York courts have frequently discussed whether a particular estate was vested or contingent, in none of these cases, so far as we can perceive, was the court's conclusion attended by any particular consequence. For example, *Moore* v. *Littel,* 41 N. Y. 66, contains a frequently cited discussion of the distinction between vested and contingent remainders. There the question was the alienability of the remainder. After a painstaking analysis that an estate to A for life, then to his

[9] "§ 40. *When future estates are vested; when contingent.* A future estate is either vested or contingent. It is vested, when there is a person in being, who would have an immediate right to the possession of the property, on the determination of all the intermediate or precedent estates. It is contingent while the person to whom or the event on which it is limited to take effect remains uncertain."

heirs (the rule in *Shelly's* case being inoperative in New York) gave the heirs living at the testator's death vested remainders, subject to divesting if they predeceased A, the court concluded that this characterization was immaterial, for it held that the interest was alienable even if contingent. Similarly, analysis of the various other New York cases discussing the question shows that in each instance the issue was academic.[10] The conclusion

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[10] In *Campbell* v. *Stokes*, 142 N. Y. 23, 29–30, the limitation was to A for life, then to his surviving issue, and the question was whether children of A were necessary parties to a partition action brought after the testator's death but before A's. After carefully reasoning that the children had vested remainders which would be divested if they predeceased A, the court concluded that, contingent or vested, their interests entitled them to participation in the proceeding.

Matter of Vanderbilt, 172 N. Y. 69, 72; *Matter of Steinwender*, 176 App. Div. 517, affirmed 221 N. Y. 611; *Matter of Haggerty*, 128 App. Div. 479, affirmed, 194 N. Y. 550; *Matter of Seaman*, 147 N. Y. 69; and *Matter of Lansing*, 182 N. Y. 238, are state inheritance tax cases. The first two dealt with a law taxing a testamentary transfer subject to future contingencies at the highest rate to which any of the contingencies might lead. As is logical, these cases reveal that the character of the future interests, as contingent or vested subject to possible divesting, was really immaterial to the construction of the law. The last three cases exempt from tax property passing by will before the enactment of the inheritance tax law, and as is made plain at page 248 of the opinion in *Matter of Lansing*, *supra*, this result would follow even if the estates in remainder were contingent until after the law had been enacted.

Matter of Watson, 262 N. Y. 284, 299, and *Matter of Leonard*, 143 Misc. 172, each involved a gift which was, substantially, to the testator's children in shares, and on the

that the distinction between remainders which are vested subject to divesting and those which are technically contingent is not of significance in New York is likewise reached in Huntington, The New York Test of Vested Remainders, (1909) 9 Columbia Law Review 687, 69[illegible].

Turning, however, to the question of what label the New York law would attach to respondents' remainders in this case, we think it fairly clear that it would describe them as vested rather than contingent; that is, as subject to a condition subsequent rather than a condition precedent.[11] In *Matter of Vanderbilt*, 172 N. Y. 69, 72, it was said:

> By the seventeenth clause of the will of the testator the residue and remainder of

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death of any child, his share to his surviving issue, or if none, the testator's other children. The question was whether the final limitation was to children living at the death of the testator or of the child. In reaching the former result the children's remainders in each share were analyzed as vested, but to be divested upon the survival of issue of the child in question. The same result could have been reached by saying that the children had contingent remainders in each share, to vest on the death of the child in question without issue.

In *Doctor* v. *Hughes*, 225 N. Y. 305, 310, reference to estates vested subject to divesting was pure dictum.

[11] A number of the Circuit Court of Appeals cases, discussed, *supra*, pp. 30–31, have involved limitations very similar to those in the present case. All but one held that the beneficiary took a vested estate, despite the existence of the divesting condition, and that the beneficiary's acquisition occurred at the testator's death. *Warner* v. *Commissioner*, *supra*; *Chandler* v. *Field*, *supra*; *Roebling* v. *Commissioner*,

his estate was given in trust to his executors for the benefit of his son Alfred G. Vanderbilt, which trust is to continue until he becomes thirty years of age, at which time one-half of the trust estate is to be turned over to him, and, as to the balance, the trust is to continue until he becomes thirty-five, when the remainder is to become his absolutely. The will also contains a provision that in case he dies before becoming thirty or thirty-five the estate shall be given to other persons. The only contingency, therefore, that can happen to defeat his taking the estate in possession is his death before the period fixed for the transfer of the possession of the property to him. The estate created, therefore, is an estate in trust for the periods mentioned, with a remainder vested in Alfred G., subject to be defeated by his death before arriving at the age of thirty or thirty-five. [Citing cases.]

This doctrine that an estate is vested when a person in being can be pointed to who would take at the termination of any preceding estate, and that a condition which might take away the right of such person before the accrual of his right to possession is a divesting condition, is repeated in a number of New York decisions. *Moore* v. *Littel*,

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supra; Fidelity & Columbia T. Co. v. *Commissioner*, 90 F. (2d) 219 (C. C. A. 6th), certiorari denied, 302 U. S. 723; *Molter* v. *Commissioner*, *supra*; *Hopkins* v. *Commissioner*, *supra*. *Reynolds* v. *Commissioner*, *supra*, reached a contrary result erroneously, we believe, under North Carolina law.

41 N. Y. 66; *Campbell* v. *Stokes,* 142 N. Y. 23, 29–30; *Matter of Watson,* 262 N. Y. 284, 299; *Matter of Seaman,* 147 N. Y. 69; *Matter of Lansing,* 182 N. Y. 238; *Doctor* v. *Hughes,* 225 N. Y. 305, 310; *West* v. *Burke,* 219 N. Y. 7, 15–16.

Before the court below, respondents laid much stress upon the so-called "divide and pay over" rule as supporting their contention that they took only a contingent estate at the testator's death. The case particularly relied upon was *Lewisohn* v. *Henry,* 179 N. Y. 352, where the gift was of a share to be held in trust, income to A until A should reach twenty-five years, at which time the trustees were "to convey, transfer, deliver, and pay over" to A one-fourth of the principal. One-third of the "capital * * * then remaining" was to be paid over to A when he reached thirty. The "residue" was to be held in trust for A for life. On A's death "the capital * * * as it shall then exist" was to be turned over to A's appointees by will, or if none, to others specified. The court, relying upon the fact that there was no gift to A except through a direction to the trustees to convey (i. e., relying upon the "divide and pay over" rule), and also upon the fact that the gift over on A's death was of the capital "as it shall then exist," not of the residue (after paying half to A), held that upon A's death under twenty-five the gift over was effective as to the entire capital, and that A's heirs did not take the one-half which would have come to A had he lived to thirty. His

arrival at the specified ages was held to be a condition of his taking.

The *Lewisohn case,* and the "divide and pay over rule" in general, are of no aid to the respondents here for two reasons. First, the rule comes into play only in case of a direction to trustees or executors to convey or pay over at a future time. The cases in which the rule has been applied involve wills with no words of gift to the designee in question other than such a direction to convey or pay over. In *Matter of Seaman, supra,* the limitation was to trustees for A for life "and upon her decease I give, devise and bequeath" to the children of B. The court observed (p. 74):

> The respondent, nevertheless, relies upon the rule applying to bequests of personalty that, where time is of the essence of the gift, and there is no present gift, nothing passes until the prescribed period arrives. (*Warner* v. *Durant,* 76 N. Y. 133; *Smith* v. *Edwards,* 88 id. 92.) A reference to those cases and others which have followed them shows that the rule formulated was for the construction of bequests where there was no gift at all, except that involved in the direction to divide at a future time. Here there are words of present gift, for the phrase "upon her decease," like the expression "from and after," does not prevent the legacy from vesting. (*Nelson* v. *Russell,* 135 N. Y. 137.) Explicitly the will

> says, "I give, devise and bequeath" the estates in remainder, and we are not compelled to resort to a direction to divide for an inference of an intention to give at all. I think the rule referred to has no application to a case like the present, where there are explicit words of gift beyond a direction to divide.
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> Upon that view of the will, it is obvious that a right of succession to the estates in remainder passed at once on the death of the testator to the four children and was a vested interest, although subject to be defeated or modified by subsequent contingencies. * * *

See also *Matter of Leonard, supra,* page 178. In the *Knox* will, the words used are "give, devise, and bequeath." The preceding words "at which time" like the words "upon her [the life tenant's] death" in the *Seaman* case do not prevent vesting of the estate at the testator's death. *Nelson* v. *Russell,* 135 N. Y. 137; *Connelly* v. *O'Brien,* 166 N. Y. 406, 408; *Matter of Werner,* 167 Misc. 92; *Matter of Kelly,* 167 Misc. 751.

Second, the "divide and pay over" rule is but a rule of construction intended to aid in ascertaining the testator's intent where it is not otherwise made clear. *Matter of Tienken,* 131 N. Y. 391, 409; *Cammann* v. *Bailey,* 210 N. Y. 19, 30; *Fulton Trust Co.* v. *Phillips,* 218 N. Y. 573, 582–583; *Matter of Benton,* 244 App. Div. 56, 61, affirmed, 269 N. Y. 579. As such, it is a rule to determine who shall

take upon the happening of a given contingency, the testator not having clearly specified. It is usually used to ascertain whether the gift is subject to any condition at all, and is not concerned with the problem whether, if the condition exists, it is a condition precedent or a condition subsequent. As Mr. Justice Cardozo observed in *N. Y. Life Ins. & Trust Co.* v. *Winthrop,* 237 N. Y. 93, at pages 103–104:

> When we speak in this connection of the vesting of an interest, we mean, of course, a vesting that is absolute and final. The statutory definition of vested and contingent estates sheds little light upon the problem, for an estate may be vested within the definition of the statute, though defeasible by death before the moment of division (*Moore* v. *Littel,* 41 N. Y. 66; *Campbell* v. *Stokes,* 142 N. Y. 23, 30; *Clowe* v. *Seavey,* 208 N. Y. 496, 502; *Doctor* v. *Hughes,* 225 N. Y. 305, 310). The only significant distinction for the purpose now in view is between an estate that is absolute and one subject to conditions (*Matter of Curtis,* 142 N. Y. 219, 223; *Matter of Seaman,* 147 N. Y. 69, 75).
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> Survivorship being a condition, we hold that it is survivorship at the time of distribution [citing cases]. We are not blind to the fact that other readings of the will are possible and plausible. In such a situation, the canon of construction which distinguishes between a direct gift and one through the medium of a mandate to de-

> liver and convey may fairly turn the scale. * * *

It is worthy of note, moreover, that even in its own field *Lewisohn* v. *Henry, supra,* is of doubtful authority. Many New York decisions preceding and following it seem to be to the contrary. *Paterson* v. *Ellis' Executors,* 11 Wend. (N. Y.) 259; *Warner* v. *Durant,* 76 N. Y. 133; *Vanderpoel* v. *Loew,* 112 N. Y. 167; *Goebel* v. *Wolf,* 113 N. Y. 405, 415; *Steinway* v. *Steinway,* 163 N. Y. 183; *Cammann* v. *Bailey,* 210 N. Y. 19; *Fulton Trust Co.* v. *Phillips,* 218 N. Y. 573; *Matter of Benton,* 244 App. Div. 56, affirmed, 269 N. Y. 579; *Matter of Eveland's Will,* 284 N. Y. 64. Compare *Matter of Tienken,* 131 N. Y. 391; *Dickerson* v. *Sheehy,* 156 App. Div. 101, affirmed, 209 N. Y. 592. Most of these cases, particularly *Cammann* v. *Bailey, Fulton Trust Co.* v. *Phillips,* and *Matter of Benton* involve limitations indistinguishable in substance from those in *Lewisohn* v. *Henry.* The cited cases hold that the payment of income to a beneficiary during the period that the principal is withheld from him, the setting apart of a separate trust share for him, and the adding of specific property to his share,[12] all are factors which indicate an intention of present vesting rather than future

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[12] Specific bank stocks were included in the trust share of respondent Seymour H. Knox, Jr. (No. 474, R. 31–32), indicating a vested estate in him. The basic limitations to the other children being substantially identical to the limitation to Seymour H. Knox, Jr., it may be assumed that they too had vested estates.

gift, and override the futurity inherent in a direction to divide and pay. All of those factors are present in the instant case, and the direction to divide and pay is absent, having been replaced here by words of direct gift.

Finally, in *Matter of Watson*, 262 N. Y. 284, the court observed (p. 300):

> The law favors the vesting of estates, and, unless a contrary intention is unequivocally expressed, it will not be imputed. * * *

Accordingly we submit that while a reading of the New York decisions will show that no substantive rights turn in that state upon the distinction between a contingent estate and an estate which is vested subject to being divested, nevertheless, it is fairly clear that the New York courts would define the estate of each of the respondents here as of the latter type.

CONCLUSION

For the reasons stated the decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

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APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 101. CAPITAL NET GAINS AND LOSSES.

(a) *Tax in case of capital net gain.*—In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in this section), there shall, at the election of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain.

(b) *Tax in case of capital net loss.*—In the case of any taxpayer, other than a corporation, who for any taxable year sustains a capital net loss (as hereinafter defined in this section), there shall be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted, and the total tax shall be this amount minus 12½ per centum of the capital net loss; but in no case shall the tax of a taxpayer who has sustained a capital net loss be less than the tax computed without regard to the provisions of this section.

(c) *Definitions.*—For the purposes of this title—

(1) "Capital gain" means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921.

(2) "Capital loss" means deductible loss resulting from the sale or exchange of capital assets.

(3) "Capital deductions" means such deductions as are allowed by section 23 for the purpose of computing net income, and are properly allocable to or chargeable against capital assets sold or exchanged during the taxable year.

(4) "Ordinary deductions" means the deductions allowed by section 23 other than capital losses and capital deductions.

(5) "Capital net gain" means the excess of the total amount of capital gain over the sum of (A) the capital deductions and capital losses, plus (B) the amount, if any, by which the ordinary deductions exceed the gross income computed without including capital gains.

(6) "Capital net loss" means the excess of the sum of the capital losses plus the capital deductions over the total amount of capital gain.

(7) "Ordinary net income" means the net income, computed in accordance with the provisions of this title, after excluding all items of capital gain, capital loss, and capital deductions.

(8) "Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in

the course of his trade or business. For the purposes of this definition—

(A) In determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property exchanged, if under the provisions of section 113, the property received has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the property exchanged.

(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

(C) In determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under the provisions of section 112 (g) of this title or under the provisions of section 203 (c) of the Revenue Act of 1924 or 1926, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution.

(d) *Collection and payment of tax.*—The total tax determined under subsection (a) or (b) shall be collected and paid in the

same manner, at the same time, and subject to the same provisions of law, including penalties, as other taxes under this title.

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 101. CAPITAL NET GAINS AND LOSSES.

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(c) *Definitions.*—For the purposes of this title—

* * * * *

(8) "Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. For the purposes of this definition—

(A) In determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property exchanged, if under the provisions of section 113, the property received has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the property exchanged.

(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of

determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

(C) In determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under the provisions of section 112 (g) of this Act or the Revenue Act of 1928, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution.

(D) In determining the period for which the taxpayer has held stock or securities the acquisition of which (or the contract or option to acquire which) resulted in the nondeductibility (under section 118 of this Act or the Revenue Act of 1928, relating to wash sales) of the loss from the sale or other disposition of substantially identical stock or securities, there shall be included the period for which he held the stock or securities the loss from the sale or other disposition of which was not deductible.

* * * * *

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * * * *

(2) *Gifts after December 31, 1920.*—If the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the

donor or the last preceding owner by whom it was not acquired by gift. If the facts necessary to determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis shall be the fair market value of such property as found by the Commissioner as of the date or approximate date at which, according to the best information that the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner.

(3) *Transfer in Trust after December 31, 1920.*—If the property was acquired after December 31, 1920, by a transfer in trust (other than by a transfer in trust by a bequest or devise) the basis shall be the same as it would be in the hands of the grantor, increased in the amount of gain or decreased in the amount of loss recognized to the grantor upon such transfer under the law applicable to the year in which the transfer was made.

(4) *Gift or Transfer in Trust before January 1, 1921.*—If the property was acquired by gift or transfer in trust on or before December 31, 1920, the basis shall be the fair market value of such property at the time of such acquisition. The provisions of this paragraph shall apply to the acquisition of such property interests as are specified in section 402 (e) of the Revenue Act of 1921, or in section 302 (f) of the Revenue Act of 1924 or the Revenue Act of 1926 (relating to property passing under power of appointment) regardless of the time of acquisition.

(5) *Property Transmitted at Death.*—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the the day of the grantor's death.

* * * * *

(13) *Property Acquired before March 1, 1913.*—In the case of property acquired before March 1, 1913, if the basis otherwise determined under this subsection, adjusted as provided in subsection (b), is less than the fair market value of the property as of March 1, 1913, then the basis shall be such fair market value. In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date.

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

ART. 501. *Definition and illustration of capital net gain.—*

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The term "capital assets" is defined to mean property held by the taxpayer for more than two years, whether or not connected with his trade or business, but not including stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. See articles 101–108 with reference to inventories. A dealer in securities is not entitled to the benefits of section 101 with reference to gain from the sale of securities. The specific property sold or exchanged must in general have been held for more than two years. However, in determining the period for which the taxpayer has held stock or securities received upon a distribution in connection with a reorganization where no gain is recognized to the distributee under the provisions of section 203 (c) of the Revenue Acts of 1924 and 1926 and section 112 (g) of the Revenue Act of 1928 (see article 576), there shall be included the period for which the taxpayer held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution. If the taxpayer has held for more than two years stock upon which a stock dividend has been declared, both the original and dividend shares are considered to be capital assets. If under the provisions of section 113

property received in an exchange has for the purpose of determining gain or loss the same basis in whole or in part in the taxpayer's hands as the property exchanged therefor, the property received in exchange is considered to be capital assets if the total period during which such property and the original property have been held is more than two years. If property is acquired from any person, and under the provisions of section 113 has the same basis in whole or in part for the purpose of determining gain or loss as it would have in the hands of the person from whom acquired, there shall be included in determining the period for which the taxpayer has held such property the period for which it was held by such person. For instance, in the case of property acquired after December 31, 1920, either by gift or by transfer in trust, the period for which the property was held by the donor shall be added to the period for which the property was held by the donee in determining whether the property was held for more than two years. (See articles 593 and 594.)

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Treasury Regulations 77, promulgated under the Revenue Act of 1932:

Art. 58. *Sale of stock and rights.*—When shares of stock in a corporation are sold from lots purchased at different dates or at different prices and the identity of the lots cannot be determined, the stock sold shall be charged against the earliest purchases of such stock. In the determination of the earliest purchases of stock the rules prescribed in subparagraphs (A), (B), (C), and (D) of section 101 (c) (8) (relating to the period for which property has been held) shall be applied. * * *

ART. 591. *Basis (unadjusted) of property.*—The basis (unadjusted) of property is, in general, the cost of such property. This general rule is, however, subject to the exceptions set forth in section 113 and articles 592–604 and 606. The term "basis" as used in this article and articles 592–604 and 606 means the basis provided in such articles before the adjustments required by section 113 (b) and article 605 are made.

ART. 596. *Property transmitted at death.*—In the following cases the basis of property acquired after February 28, 1913, shall be the fair market value of the property at the time of the death of the decedent:

(1) Personal property acquired by specific bequest;

(2) Real property acquired by general or specific devise or by intestacy; and

(3) Property, whether real or personal, in the hands of a decedent's estate, acquired by the estate from the decedent (see article 863).

In all other cases where the property was acquired either by will or by intestacy after February 28, 1913, the basis shall be the fair market value of the property at the time of its distribution to the taxpayer.

* * * * *

If the property was acquired prior to March 1, 1913, the basis shall be determined as provided in section 113 (a) (13) and article 606.

For the purposes of this article, the value of property as appraised for the purpose of the Federal estate tax or in the case of estates not subject to that tax, its value as appraised in the State court for the purpose of State inheritance taxes shall be deemed to be its fair market value at the time of the death of the decedent.

Art. 600. ***Stock or securities distributed in reorganization—***

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(4) Where the stock in respect of which a distribution in reorganization is made was purchased at different times or at different prices, and the stock or securities distributed in reorganization cannot be identified as having been distributed in respect of any particular lot of such stock, then any sale of the stock or securities distributed in reorganization will be presumed to have been made from the stock or securities distributed in respect of the earliest purchased stock.

Art. 606. ***Property acquired before March 1, 1913.***—In the case of property acquired before March 1, 1913, if the basis otherwise determined under section 113 (a), adjusted to March 1, 1913, in accordance with section 113 (b), is less than the fair market value of the property as of March 1, 1913, then the basis is such fair market value.

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